

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LON ALLEN CLARK,

v.
Plaintiff,

CORY MCCORMICK, et al.,

Defendants.

Case No. 3:24-CV-163-ART-CLB

ORDER ADOPTING IN PART REPORT
AND RECOMMENDATION OF U.S.
MAGISTRATE JUDGE (ECF No. 6)

10 Plaintiff Lon Allen Clark brings this civil rights action against Defendants
11 Cory McCormick, Las Vegas Metropolitan Police Department, City of Las Vegas,
12 and State of Nevada under 42 U.S.C. § 1983. Clark's claims arise out of the events
13 surrounding his arrest on November 15, 2019. In his complaint, Clark states the
14 following claims, which will be numbered in this order for clarity as follows: (1)
15 excessive force during his arrest, (2)(a) denial an attorney during police
16 questioning and retaliation, (2)(b) deliberate indifference with regards to medical
17 care, and (3) racial profiling during his arrest.

18 Before the Court is Clark's motion to proceed *in forma pauperis*, (ECF Nos.
19 1, 4), *pro se* civil rights complaint (ECF No. 1-1), and motion for counsel, (ECF
20 No. 1-4). Magistrate Judge Carla L. Baldwin issued a Report and
21 Recommendation ("R&R") recommending that the *in forma pauperis* application
22 be denied as moot, the complaint be dismissed without prejudice and without
23 leave to amend, and the motion for counsel be denied as moot. (ECF No. 6.)
24 Plaintiff filed objections to the Magistrate Judge's R&R. (ECF No. 7.)

For the reasons detailed in this order, the Court ADOPTS IN PART Judge Baldwin's R&R. The Court orders that Plaintiff may proceed with Claim 1 for excessive force against Defendant McCormick. The Court dismisses without prejudice and without leave to amend Claim 2(a). The Court dismisses without

1 prejudice and with leave to amend Claims 2(b) and 3. The Court further
 2 dismisses, without prejudice and with leave to amend, Defendants Las Vegas
 3 Metropolitan Police Department and City of Las Vegas. The Court further
 4 dismisses, with prejudice, Defendant State of Nevada. The Court grants Plaintiff's
 5 application to proceed *in forma pauperis* and denies Plaintiff's motion for
 6 appointment of counsel. The Court grants Plaintiff leave to amend his complaint,
 7 if he wishes to, by November 1, 2024.

I. Review of Reports and Recommendations

Under the Federal Magistrates Act, a Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by [a] magistrate judge." 28 U.S.C. § 636(b)(1). Where a party timely objects to a magistrate judge's report and recommendation, then the court is required to "make a de novo determination of those portions of the [report and recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). A court is not required to conduct "any review at all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985).

II. Analysis

Judge Baldwin's R&R recommended dismissal of Plaintiff's complaint because his complaint appears to challenge the constitutionality of his state court criminal conviction. (ECF No. 6 at 4.) Such a challenge must be brought in a habeas corpus action and not under § 1983. *Heck v. Humphrey*, 512 U.S. 477 (1994). Plaintiff objects that he is not trying to challenge his conviction. (ECF No. 7.) As such, the Court reviews the R&R *de novo*.

A person may not recover under § 1983 for damages for an allegedly unconstitutional conviction or imprisonment in a state criminal proceeding which resulted in a conviction. *Heck v. Humphrey*, 512 U.S. 477 (1994). Rather, where a plaintiff has suffered conviction in a state criminal proceeding, this type of challenge must be brought in a habeas corpus action. *Id.* at 481-83. In a § 1983

1 action, where “a judgment in favor of the plaintiff would necessarily imply the
 2 invalidity of his conviction or sentence,” then “the complaint must be dismissed
 3 unless the plaintiff can demonstrate that the conviction or sentence has already
 4 been invalidated.” *Id.* at 487. However, a person may recover under § 1983 for
 5 damages where the action would not necessarily imply the invalidity of the
 6 conviction or sentence. *Id.* at 482–83; *see also Skinner v. Switzer*, 562 U.S. 521,
 7 533 (2011). Where the complaint alleges claims that sound in habeas and claims
 8 that do not, the court should allow the non-habeas claims to proceed. *See Ybarra*
 9 *v. Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 681–82 (9th Cir. 1984).

10 Here, Plaintiff alleges (1) excessive force during his arrest, (2)(a) denial an
 11 attorney during police questioning and retaliation, (2)(b) deliberate indifference
 12 with regards to medical care, and (3) racial profiling during his arrest. As detailed
 13 below, the Court finds that Claim 1 may proceed, Claim 2(a) is barred, Claim 2(b)
 14 fails to state a claim as plead, and Claim 3 is barred by *Heck* as plead.

15 **A. Claim 1: Excessive Force**

16 An excessive force claim does not necessarily imply the invalidity of a
 17 person’s conviction. *See Lemos v. County of Sonoma*, 40 F.4th 1002, 1006–07 (9th
 18 Cir.) (en banc); *Reese v. County of Sacramento*, 888 F.3d 1030, 1045–46 (9th Cir.
 19 2018) (concluding that § 1983 claim alleging excessive force did not necessarily
 20 imply the invalidity of the conviction); *Hooper v. County of San Diego*, 629 F.3d
 21 1127, 1132–33 (9th Cir. 2011) (explaining that a § 1983 action claiming excessive
 22 force was used during arrest would not necessarily imply or demonstrate the
 23 invalidity of the conviction); *Guerrero v. Gates*, 442 F.3d 697, 703 (9th Cir. 2006)
 24 (explaining that § 1983 claim was cognizable because allegations of excessive
 25 force do not affect validity of the criminal conviction).

26 In deciding whether success on a § 1983 excessive force claim would imply
 27 the invalidity of a conviction, the court must determine which acts formed the
 28 basis of the conviction, or in the case of a guilty plea, the acts forming the basis

1 for the plea. “When the factual predicate of the conviction is not clear from the
 2 record and the conviction could have been based on an act of resistance or
 3 obstruction different from the plaintiff’s conduct during the allegedly unlawful
 4 use of force, a judgment in the plaintiff’s favor in the § 1983 action would not
 5 ‘necessarily imply the invalidity of [the] conviction.’” *Martell v. Cole*, 115 F.4th
 6 1233, 1240–41 (9th Cir. 2024).

7 Here, Plaintiff asserts that he was in a lawfully rented U-Haul vehicle and
 8 was approached by two officers who did not identify themselves as police and told
 9 him to “get out of the way” or “I’ll fucking shoot you.” (ECF No. 1-1 at 2, 5.) He
 10 alleges that as he accelerated his vehicle, he was shot at 7 times and ultimately
 11 struck with shrapnel during his arrest while unarmed and attempting to drive
 12 away from police officers. (*Id.* at 3, 5; ECF No. 1-2 at 2-3.) Based on the complaint
 13 before the Court, the factual predicate to Plaintiff’s conviction is not entirely clear,
 14 and it could have been based on conduct separate from the conduct during the
 15 allegedly unlawful use of force. Thus, Plaintiff’s § 1983 action would not
 16 necessarily imply the invalidity of the conviction and he may bring this excessive
 17 force claim under § 1983. See *Martell*, 115 F.4th at 1240–41.

18 “Claims for excessive force are analyzed under the Fourth Amendment’s
 19 prohibition against unreasonable seizures using the framework articulated in
 20 *Graham v. Connor*.” *Young v. Cnty. of Los Angeles*, 655 F.3d 1156, 1161 (9th Cir.
 21 2011) (citing 490 U.S. 386 (1989)). Under this framework, courts must determine
 22 whether the government’s use of force was “‘objectively reasonable’ in light of the
 23 facts and circumstances confronting them” *Graham*, 490 U.S. at 397. This
 24 determination requires a balancing of “the nature and quality of the intrusion on
 25 the individual’s Fourth Amendment interests against the countervailing
 26 governmental interests at stake.” *Id.* at 396 (internal quotation marks omitted).
 27 In evaluating a Fourth Amendment excessive force claim, a court looks to the
 28 totality of the circumstances and considers (1) the severity of the crime at issue,

1 (2) whether the suspect presents an immediate threat to the officer or to public
 2 safety; and (3) whether the suspect is actively resisting or evading arrest. *Id.*

3 Based on the allegations in the Complaint, Plaintiff was shot by Officer
 4 McCormick while unarmed, driving a lawfully rented vehicle during his arrest,
 5 causing him injuries requiring surgery. The Court thus finds that Plaintiff, at this
 6 stage, has plead a colorable excessive force claim against Defendant McCormick.
 7 The Court accordingly DENIES the magistrate judge's recommendation to
 8 dismiss this claim. Plaintiff may proceed with claim of excessive force against
 9 Defendant McCormick.

10 **B. Claim 2(a): Denial of Attorney and Retaliation**

11 Plaintiff next asserts that he was denied an attorney during police
 12 questioning, and then told that he would be prosecuted to the fullest extent for
 13 not speaking with detectives with an attorney present. (ECF No. 1-1 at 4.)

14 The Court construes this claim of denial of an attorney during police
 15 questioning and retaliation as a claim under the Fifth Amendment for violation
 16 of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The remedy for a
 17 violation of the Fifth Amendment right against self-incrimination is suppression
 18 at trial; thus, a Plaintiff may not bring a Fifth Amendment claim under § 1983.
 19 *Vega v. Tekoh*, 597 U.S. 134, 150-152 (2022). The Court thus agrees with Judge
 20 Baldwin's conclusion that this claim cannot be brought under § 1983.

21 As it would be futile for Plaintiff to amend his § 1983 complaint, the Court
 22 dismisses this claim without prejudice but without leave to amend in this action,
 23 so that Plaintiff may bring this claim in postconviction proceedings.

24 **C. Claim (2)(b): Deliberate Indifference – Medical Care**

25 From Plaintiff's complaint, it appears that he alleges inadequate medical
 26 care while he was a pretrial detainee.¹ Claims of inadequate medical care in the

27 ¹ Because resolution of this claim would not result in would not necessarily imply
 28

1 context of a pretrial detainee are governed by the Fourteenth Amendment.
 2 *Trueblood v. Wash. State Dep’t of Soc. & Health Servs.*, 822 F.3d 1037, 1043 (9th
 3 Cir. 2016). In order to state a claim for deliberate indifference to serious medical
 4 needs as a pretrial detainee, a Plaintiff must show that: “(i) the defendant made
 5 an intentional decision with respect to the conditions under which the plaintiff
 6 was confined; (ii) those conditions put the plaintiff at substantial risk of suffering
 7 serious harm; (iii) the defendant did not take reasonable available measures to
 8 abate that risk, even though a reasonable official in the circumstances would
 9 have appreciated the high degree of risk involved—making the consequences of
 10 the defendant's conduct obvious; and (iv) by not taking such measures, the
 11 defendant caused the plaintiff's injuries.” *Gordon v. Cnty. of Orange*, 888 F.3d
 12 1118, 1125 (9th Cir. 2018).

13 Plaintiff's complaint states that he was transported to the hospital after
 14 being shot, was in surgery for five hours, and was then released into the custody
 15 of the Metropolitan Police Department. (ECF No. 1-1 at 4.) Plaintiff then alleges
 16 he was interrogated by the police. (*Id.*) He then alleges that he “had medical
 17 complications and lost weight and severe mental stress.” (*Id.*) Based on the
 18 allegations in the complaint, Plaintiff has failed to state a claim for deliberate
 19 indifference to serious medical needs because Plaintiff fails to provide the Court
 20 enough detail regarding whether any Defendant made decisions which put
 21 Plaintiff at risk of suffering serious harm, failed to take measures to abate this
 22 risk, and thus caused Plaintiff's injuries. Plaintiff also fails to allege which
 23 Defendant he alleges took such actions. However, the Court will grant Plaintiff
 24 leave to amend his complaint to add such details. If Plaintiff chooses to amend
 25 his complaint a to this claim, he should include which Defendant(s) he alleges
 26 were responsible for this constitutional violation.

27 the invalidity of the conviction or sentence, it is not barred by *Heck* and may be
 28 brought under section 1983. See *Heck*, 512 U.S. at 482–83.

1 **D. Claim 3: Racial Profiling**

2 Plaintiff next alleges that his arrest was the result of racial profiling. This
 3 also falls under the category of claims which challenge a plaintiff's state court
 4 conviction. A finding that there was no probable cause for an arrest would
 5 necessarily imply that the conviction was invalid. *See e.g., Cabrera v. City of*
Huntington Park, 159 F.3d 374, 380 (9th Cir. 1998) (concluding that claims for
 6 false arrest and false imprisonment were not cognizable because a finding that
 7 there was no probable cause to arrest plaintiff for disturbing the peace would
 8 necessarily imply that plaintiff's conviction for disturbing the peace was invalid).

9
 10 This claim cannot be brought under § 1983 and must be brought in a
 11 habeas corpus action, unless Plaintiff can show that he was not convicted or his
 12 conviction was later invalidated. *See Heck v. Humphrey*, 512 U.S. 477, 483–87.

13 The Court thus agrees with Judge Baldwin's analysis that this claim, as it
 14 is plead, cannot be brought under § 1983. However, if Plaintiff can demonstrate
 15 that he has not been convicted or his conviction has been invalidated,
 16 amendment to his complaint would not be futile. Thus, the Court will grant
 17 Plaintiff leave to amend his complaint to demonstrate that he was not convicted,
 18 or his conviction was later invalidated, under *Heck*, 512 U.S. at 486-87. If,
 19 however, Plaintiff was convicted and the conviction has not been invalidated,
 20 Plaintiff should not amend his complaint as to this claim and can choose to bring
 21 these claims in a separate habeas corpus action.

22 **E. DEFENDANTS**

23 Plaintiff brings his claims against Officer Cory McCormick, Las Vegas
 24 Metropolitan Police Department, the City of Las Vegas, and the State of Nevada.

25 **1. State of Nevada**

26 States are not suable entities under § 1983. *Will v. Michigan Dep't of State*
Police, 491 U.S. 58, 71 (1989) (a state is not a "person" within the meaning of §
 27 1983). The enactment of § 1983 did not abrogate the states' Eleventh Amendment
 28

1 immunity. *Stilwell v. City of Williams*, 831 F.3d 1234, 1245 (9th Cir. 2016). As
 2 such, a claim under § 1983 cannot be brought against a state itself. *See Jackson*
 3 *v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989), superseded by statute on other
 4 grounds as stated in *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en
 5 banc). Because Plaintiff may not bring a § 1983 claim against Defendant State of
 6 Nevada, the Court will dismiss this defendant with prejudice as amendment
 7 would be futile.

8 **2. City of Las Vegas and Las Vegas Metropolitan Police Department**

9 A municipality may not be held liable merely because it employs someone
 10 who violates a person's constitutional rights. *Monell v. Dep't of Social Serv. of City*
 11 *of N.Y.*, 436 U.S. 658, 691 (1978). Rather, A municipality may be found liable
 12 under 42 U.S.C. § 1983 only where the municipality itself causes the violation at
 13 issue. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) (citing *Monell*, 436
 14 U.S. 658. To state a claim for municipal or county liability, a plaintiff must allege
 15 that he suffered a constitutional deprivation that was the product of a policy or
 16 custom of the local government unit. *City of Canton*, 489 U.S. at 385. "Official
 17 municipal policy includes the decisions of a government's lawmakers, the acts of
 18 its policymaking officials, and practices so persistent and widespread as to
 19 practically have the force of law." *See Connick v. Thompson*, 563 U.S. 51, 61
 20 (2011). Municipalities are not vicariously liable under § 1983 for their employees'
 21 actions. *Id.* at 60.

22 To show this, a plaintiff must allege that the municipal defendant has "a
 23 policy statement, ordinance, regulation, or decision officially adopted and
 24 promulgated by that body's officers," or a "custom even though such a custom
 25 has not received formal approval through the body's official decision-making
 26 channels," and that this policy or custom caused the violation of the plaintiff's
 27 constitutional rights. *Monell*, 436 U.S. at 690-91. A plaintiff may also establish
 28 municipal liability by demonstrating that the alleged constitutional violation was

1 caused by a failure to train municipal employees adequately. *See City of Canton*,
 2 489 U.S. at 388–91; *Garmon v. County of Los Angeles*, 828 F.3d 837, 846 (9th
 3 Cir. 2016). To allege a failure to train, a plaintiff must include sufficient facts to
 4 support a reasonable inference (1) of a constitutional violation; (2) of a municipal
 5 training policy that amounts to a deliberate indifference to constitutional rights;
 6 and (3) that the constitutional injury would not have resulted if the municipality
 7 properly trained their employees. *Benavidez v. County of San Diego*, 993 F.3d
 8 1134, 1153–54 (9th Cir. 2021).

9 Plaintiff's complaint does not allege that any Defendants acted pursuant to
 10 an official policy or custom of the City of Las Vegas or Las Vegas Metropolitan
 11 Police Department. As such, the allegations in the complaint currently do not
 12 support a colorable claim of municipal liability. The Court will grant Plaintiff leave
 13 to amend his complaint as to these Defendants. If Plaintiff wishes to bring a claim
 14 against the City of Las Vegas and/or Las Vegas Metropolitan Police Department
 15 in an amended complaint, he must allege specific facts supporting that the
 16 Defendants acted pursuant to an official policy or custom.

17 III. IN FORMA PAUPERIS (“IFP”) APPLICATION

18 As the Magistrate Judge's R&R recommended dismissal of all of Plaintiff's
 19 claims, it did not screen Plaintiff's IFP application. As the Court is allowing one
 20 of Plaintiff's claims to proceed, the Court now does so.

21 A person may be granted permission to proceed *in forma pauperis* if the
 22 person “submits an affidavit that includes a statement of all assets such [person]
 23 possesses [and] that the person is unable to pay such fees or give security
 24 therefor. Such affidavit shall state the nature of the action, defense or appeal and
 25 affiant's belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

26 The Local Rules of Practice for the District of Nevada provide: “Any person
 27 who is unable to prepay the fees in a civil case may apply to the court for authority
 28 to proceed [IFP]. The application must be made on the form provided by the court

1 and must include a financial affidavit disclosing the applicant's income, assets,
 2 expenses, and liabilities." LSR 1-1.

3 Based on the information provided regarding Plaintiff's financial status, the
 4 Court finds that Plaintiff is not able to pay an initial installment payment toward
 5 the full filing fee pursuant to 28 U.S.C. § 1915. Plaintiff will, however, be required
 6 to make monthly payments toward the full \$350.00 filing fee when he has funds
 7 available.

8 **IV. MOTION FOR COUNSEL**

9 Plaintiff has filed a motion for appointment of counsel (ECF No. 1-4)
 10 requesting counsel in this action.

11 A litigant does not have a constitutional right to appointed counsel in 42
 12 U.S.C. § 1983 civil rights claims. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th
 13 Cir. 1981). Pursuant to 28 U.S.C. § 1915(e)(1), "[t]he court may request an
 14 attorney to represent any person unable to afford counsel." However, the court
 15 will appoint counsel for indigent civil litigants only in "exceptional
 16 circumstances." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (§ 1983
 17 action). "When determining whether 'exceptional circumstances' exist, a court
 18 must consider 'the likelihood of success on the merits as well as the ability of the
 19 petitioner to articulate his claims pro se in light of the complexity of the legal
 20 issues involved." *Id.* "Neither of these considerations is dispositive and instead
 21 must be viewed together." *Id.*

22 In the instant case, Plaintiff has neither demonstrated a likelihood of
 23 success on the merits nor exceptional circumstances that warrant the
 24 appointment of counsel. The Court denies the motion for appointment of counsel
 25 at this stage.

26 **V. LEAVE TO AMEND**

27 Plaintiff is granted leave to file an amended complaint to cure the
 28 deficiencies of the complaint. If Plaintiff chooses to file an amended complaint, he

1 is advised that an amended complaint supersedes (replaces) the original
2 complaint, and, thus, the amended complaint must be complete in itself. *See Hal*
3 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir.
4 1989) (holding that “[t]he fact that a party was named in the original complaint
5 is irrelevant; an amended pleading supersedes the original”); *see also Lacey v.*
6 *Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding that for claims
7 dismissed with prejudice, a plaintiff is not required to reallege such claims in a
8 subsequent amended complaint to preserve them for appeal). Plaintiff’s amended
9 complaint must contain all claims, defendants, and factual allegations that
10 Plaintiff wishes to pursue in this lawsuit. Moreover, Plaintiff should file the
11 amended complaint on this Court’s approved prisoner civil rights form, and it
12 must be entitled “First Amended Complaint.”

13 VI. CONCLUSION

14 It is therefore ordered that Plaintiff’s objection to Judge Baldwin’s Report
15 and Recommendation (ECF No. 7) is OVERRULED IN PART.

16 It is further ordered that Judge Baldwin’s Report and Recommendation
17 (ECF No. 6) is ADOPTED IN PART.

18 It is further ordered that Plaintiff’s *in forma pauperis* application (ECF No.
19 1) is GRANTED. Plaintiff will not be required to pay an initial installment fee.
20 Nevertheless, the full filing fee will still be due, pursuant to 28 U.S.C. § 1915.
21 The movant herein is permitted to maintain this action to conclusion without the
22 necessity of prepayment of fees or costs or the giving of security therefor.

23 It is further ordered that, pursuant to 28 U.S.C. § 1915, the Nevada
24 Department of Corrections will forward payments from the account of INMATE’S
25 NAME, INMATE’S PRISON # to the Clerk of the United States District Court,
26 District of Nevada, 20% of the preceding month’s deposits (in months that the
27 account exceeds \$10.00) until the full \$350 filing fee has been paid for this action.
28 The Clerk of the Court is directed to send a copy of this order to the Finance

1 Division of the Clerk's Office. The Clerk is also directed to send a copy of this
2 order to the Chief of Inmate Services for the Nevada Department of Corrections
3 at formapauperis@doc.nv.gov.

4 It is further ordered that, even if this action is dismissed, or is otherwise
5 unsuccessful, the full filing fee will still be due, pursuant to 28 U.S.C. §1915.

6 It is further ordered that the Clerk FILE the complaint (ECF No. 1-1).

7 It is further ordered that Plaintiff's Fourth Amendment excessive force
8 claim (Claim 1) MAY PROCEED against Defendant McCormick.

9 It is further ordered that Plaintiff's Fifth Amendment claim regarding the
10 denial of an attorney during police questioning and retaliation (Claim 2(a)) is
11 DISMISSED without prejudice but without leave to amend in this action.

12 It is further ordered that Plaintiff's inadequate medical care claim (Claim
13 2(b)) and racial profiling claim (Claim 3) are DISMISSED WITH LEAVE TO
14 AMEND, as discussed above.

15 It is further ordered that Defendants City of Las Vegas and Las Vegas
16 Metropolitan Police Department are DISMISSED from this action, without
17 prejudice and with leave to amend.

18 It is further ordered that Defendant State of Nevada is DISMISSED from
19 this action with prejudice, as amendment would be futile.

20 **It is further ordered that if Plaintiff chooses to file an amended
21 complaint, he must do so by November 1, 2024.**

22 It is further ordered that Plaintiff's motion for counsel (ECF No. 1-4) is
23 DENIED.

24 Dated this 1st day of November, 2024.
25

26 
27 _____
28 ANNE R. TRAUM
UNITED STATES DISTRICT JUDGE